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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Open Network Architecture Tariffs of US West Communications, Inc.	)	CC Docket No. 94-128
	)	
	)	

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI) hereby replies to the Opposition filed by US West Communications, Inc. (USWC) to MCI's Application for Review of the Common Carrier Bureau's Designation Order in this proceeding (USWC Designation Order),[1/] which Application was filed on December 8, 1994. Contrary to USWC's view of the law, this investigation of its ONA tariffs is subject to the basic requirements of the Communications Act, the Administrative Procedure Act and the U.S. Constitution. For the reasons explained in MCI's December 8 Application for Review, which US West has not deigned to answer substantively in its Opposition, those legal requirements preclude the type of secret ratemaking authorized by the confidentiality procedures of the USWC Designation Order. Those procedures must therefore immediately be modified in the manner requested by MCI in order to assure a fair, meaningful investigation.

1/ Order Designating Issues for Investigation, Open Network Architecture Tariffs of US West Communications, Inc., CC Docket No. 94-128, DA 94-1236 (released Nov. 8, 1994).

USWC's Failure to Rebut MCI's Arguments

For the most part, USWC states that MCI is raising the same issues here as it did in the ONA Tariff Investigation[2/] and that those issues were settled in the SCIS Disclosure proceeding.[3/] For the reasons stated, however, in MCI's Petition for Reconsideration of the SCIS Disclosure Review Order, attached as Appendix A to MCI's December 8 Application for Review, the SCIS Disclosure orders were wrongly decided, and the same reasons require modification of the redaction and confidentiality procedures of the USWC Designation Order. USWC has failed to rebut any of MCI's arguments or to explain why any of them would not be equally applicable to this ONA tariff investigation.

USWC tries to raise only one substantive point -- namely that the legal rights MCI asserts as to adequate access to data on which the FCC relies do not apply to tariff investigations.[4/] USWC, however, appears to have confused initial challenges to tariff filings, such as petitions to reject or to suspend and investigate, with the "full hearing" that the Commission may conduct, either in response to such a petition or on its own

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[2/] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, Order, 9 FCC Rcd. 440 (1993) (ONA Final Order), pet. for recon. pending (filed Jan. 14, 1994).

[3/] Commission Requirements for Cost Support Material To Be Filed With Open Network Architecture Access Tariffs, Memorandum Opinion and Order, 7 FCC Rcd. 1526 (CCB 1992) (SCIS Disclosure Order), aff'd, Order, 9 FCC Rcd. 180 (1993) (SCIS Disclosure Review Order), pet. for recon. pending (filed Jan. 14, 1994).

[4/] USWC Opp. at 2-4.

motion, concerning the lawfulness of a tariff under Section 204(a)(1) of the Communications Act, 47 U.S.C. § 204(a)(1). The cases USWC cites address only petitions challenging tariff filings or other non-final agency actions, rather than full-blown tariff investigations. Parties challenging tariffs initially do not necessarily have full rights to all of the underlying cost support data because the Commission's decision to allow a tariff to go into effect is not a finding that the tariff is lawful, nor is it a final order. See Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234-35 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981) (Aeronautical Radio). Since no final rights or liabilities are determined by a decision allowing a tariff to go into effect, it may be argued that no due process rights are implicated in a denial of access to some cost support materials underlying such a tariff.

Once the Commission has decided to conduct a "full hearing" under Section 204, however, the stakes are much greater. Such a hearing results in a "final," appealable order as to the lawfulness of a tariff, just "as would be proper in a proceeding initiated after" the tariff had gone into effect.[5/] The distinction between an initial challenge to a tariff and a full hearing concerning the lawfulness of a tariff, to which the right of judicial review and other procedural rights attach, was

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[5/] See Sections 204(a)(1) and 204(a)(2)(C), 47 U.S.C. §§ 204(a)(1), 204(a)(2)(C).

explained in Papago Tribal Util. Auth. v. FERC, 628 F.2d 235 (D.C. Cir.), cert. denied, 449 U.S. 1061 (1980) (cited in Aeronautical Radio, 642 F.2d at 1234):

> The quintessential reviewable order... is a final determination by the Commission concerning the justness and reasonableness of the rate filing. Such a determination, generally made after a lengthy hearing during which all relevant legal and factual questions are aired, disposes of all significant disputed issues in the case on their merits and fixes the obligations of the parties. The decision to accept a rate filing, in contrast, is undeniably interlocutory. Acceptance of a filing decides nothing concerning the merits of the case; it merely reserves the issues pending a hearing.[6/]

Moreover, because the end result of a tariff investigation is a final, reviewable order on the lawfulness of a tariff filing, the Commission has held that the findings in such an order are binding on subsequent complaint cases challenging the same tariff revisions.[7/]

USWC has not explained why the procedural requirements set forth in MCI's December 8 Application for Review and the Appendices thereto do not apply to a "full hearing" resulting in a "final order" as to the lawfulness of a tariff, which order may be binding in subsequent complaint cases. USWC attempts to distinguish the cases MCI relies on by characterizing them as

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[6/] 628 F.2d at 239-40.

[7/] See Viacom International, Inc. and Cable Health Network, Inc. v. RCA American Communications, Inc., File No. E-83-19, 4 FCC Rcd. 8212 at ¶ 5 (1989), aff'd sub nom. Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991).

cases that address "reasoned decisionmaking in the context of a rulemaking and an administrative hearing,"[8/] as if that made them different from this tariff investigation. USWC has failed to explain why the procedural rights attaching to "an administrative hearing" do not attach to this administrative "full hearing." As explained at pages 6-8 of MCI's Reply to Oppositions to its Petition for Reconsideration of the ONA Investigation Final Order, attached as Appendix G to its December 8 Application for Review, the procedural requirements for "reasoned decisionmaking," to use USWC's phrase, apply fully to tariff investigation hearings. The Commission therefore may not rely on any data in such a hearing that was not made available to opposing parties. See U.S. Lines, 584 F.2d at 533-43. See also Sea-Land Service, Inc. v. FMC, 653 F.2d 544, 551-52 (D.C. Cir. 1981); Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir), cert. denied, 434 U.S. 829 (1977); American Lithotripsy, 785 F.Supp. at 1036.

Conclusion

USWC having essentially defaulted on its obligation to respond to MCI's December 8 Application for Review, the latter should be granted and the USWC Designation Order modified to

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[8/] USWC Opp. at 3, citing American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034 (D.D.C. 1992) (American Lithotripsy), and U.S. Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (U.S. Lines).

allow MCI and other parties adequate access to USWC's SCM cost model and all other data supporting its ONA tariffs.

Respectfully submitted,

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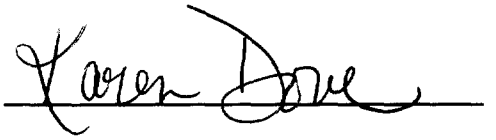
Dated: January 5, 1995

CERTIFICATE OF SERVICE

I, Karen E. Dove, do hereby certify that true and correct copies of the foregoing REPLY TO OPPOSITION TO APPLICATION FOR REVIEW, were served this 5th day of January, 1995, by first-class mail, postage prepaid, upon the attached parties.



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